



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 653 OF 2007

RAMNIKLAL SHAH.....PLAINTIFF
- VERSUS -
FINA BANK LIMITED1ST DEFENDANT
KIRPAN INVESTMENTS LIMITED2ND DEFENDANT
PATEL & PATEL ADVOCATES.....3RD DEFENDANT
COMMISSIONER OF LANDS4TH DEFENDANT

RULING

1. The original plaintiff in this suit is deceased. Satish Chandra Bhimji Meghji Shah has been substituted as plaintiff. The pleadings unfortunately have continued to reflect the name of the deceased. When the deceased filed the plaint on 17th December 2007, he contemporaneously filed a chamber summons of even date praying for interlocutory reliefs. One of those reliefs at prayer 3 was to “restrain the 2nd defendant or its agents from trespassing onto, evicting or interfering” with the plaintiff’s quiet possession of L R No 209/64/31 Nairobi.

2. In a considered ruling dated 21st October 2008 the Honourable Lady Justice H.M. Okwengu ruled as follows;

“The applicant does not therefore deserve the equitable remedy of interlocutory injunction. From the application under consideration prayer No (5) seeks a declaratory order to the effect that the sale and transfer of the suit property by the 1st defendant to the 2nd defendant under the Charge dated 11th July, 2005 was null and void. Such a prayer can only be made after evidence has been adduced and a finding has been made that the Charge dated 11th July, 2005 was indeed null and void. At this interlocutory stage, there is no evidence before the court upon which such a conclusion can be arrived at, nor does the court have the mandate to make such conclusive findings. For the reasons, I dismiss the applicant’s chamber summons filed on 18th December, 2007. I award costs of the application to the 1st, 2nd and 3rd respondents. Thos shall be the orders of this court”.

Clearly the prayers the plaintiff sought against eviction from the suit premises by the 2nd defendant were dismissed.

3. The 2nd defendant has now filed a chamber summons dated 3rd May 2011 praying for the following orders;

- a) **THAT** this Honourable court do grant leave to the 2nd Defendant to forthwith enter upon and repossess the suit premises, being L.R No 209/64/31 Nairobi.
 - b) **THAT** the costs and expenses occasioned by and incidental to the 2nd Defendant's entry and repossession of the suit premises be borne by the Plaintiff and/ or his representative.
 - c) **THAT** the OCS commanding the nearest Police Station do supervise the execution of these orders.
- The principal grounds as buttressed by the annexed affidavit of Kiran D. Shah of 17th December 2009 are that the 2nd defendant purchased the suit property from the 1st defendant bank under the latter's statutory power of sale; The plaintiff has not vacated the premises despite the ruling and order of court of 21st October 2008 dismissing the application for injunction. The applicant avers that despite notices to vacate, the plaintiff or his representative has failed or refused to vacate and hence the prayers now before the court. The 2nd defendant avers it is a *bona fide* purchaser for value and that the plaintiff or his representative is in illegal occupation of the suit premises and continues to collect rent and to benefit to the prejudice of the applicant. Lastly the applicant in its submissions avers that it is not seeking to strike out the suit but merely to ensure the plaintiff delivers up possession of the suit premises.

4. Satish Shah, who has been substituted as plaintiff has sworn a replying affidavit dated 15th November 2011. Paragraphs 5 to 19 raise the same arguments that the deceased raised before Hon. Okwengu J challenging the charge instruments and the right of the bank to realize the security. He confirms at paragraph 20 and 23 that he is residing in the suit premises, that he is old and ailing and will suffer irreparable harm. I am not called upon to reappraise the matters of the charge instrument or whether the bank was entitled to sell. Those matters were dealt with at length by my sister Justice Okwengu in the ruling of 21st October 2008. As I have said, the plaintiff or his representative Satish Chandra Shah lost the cover of injunction from eviction from the suit premises. That the said representative is still in possession is an act of acquiescence or non-enforcement of the rights of the 2nd defendant.

5. I also note that in the amended defence and counterclaim by the 2nd defendant dated 19th May 2009, it has prayed at prayers 1,2,3,4 and 5 for vacant possession and declarations that the plaintiff is not entitled to possession of the suit property.

6. The present chamber summons is expressed to be brought under order XXXIX rule 7 (1) (b) of the Civil Procedure Rules and section 63 (e) of the Civil Procedure Act. This motion is dated 3rd May 2011 and was filed on 27th June 2011. The new Civil Procedure Rules 2010 which were in force have no order titled XXXIX rule 7 (1) (b). That would then not be the basis of the motion. Section 63(e) of the Act is a general provision allowing the court "to make such other interlocutory orders as may appear to the court to be just and convenient". That power reposes in the court to prevent the ends of justice from being defeated. In the light of article 159 of the constitution, sections 1A and 1B of the Civil Procedure Act as read together with sections 3, 3A and 63 (e) of the Civil Procedure Act, I would disregard the technicalities and find that the motion is properly before me. The question would be whether it has merits.

What the 2nd defendant is praying for is essentially a mandatory injunction to remove the plaintiff, in this case the representative Satish Chandra Shah from the suit premises. The basis for that is the finding in the ruling of 21st October 2008 aforesaid. Authorities in

this area abound and they hold, primarily that a mandatory interlocutory injunction ought not to be granted save only in special circumstances and in the clearest of cases. It can not be better said than in the decision of *Locabail International Finance Limited Vs Agro Export et al* [1986] 1 ALL E.R. 901 where their lordships held;

"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the Defendant had attempted to steal a march on the plaintiff. Moreover before granting a mandatory injunction the Court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being on a different and higher standard than was

required for a prohibitory injunction”.

See also the decision in *Technomatic Limited T/A Promopack Company Vs Kenya Wine Agencies Limited* Nairobi HCCC 398 of 2005 (unreported). That position has been stated clearly in *Halsbury's Laws of England* 4th Edition Volume 24 paragraph 848.

For the 2nd defendant to succeed in an application for mandatory injunction at the interlocutory stage, the standards go beyond a *Prima facie* case in ordinary prohibitory injunction. The court must be so clear in its mind that the 2nd defendant would, at the trial, almost be assured of getting the same relief. Order 40 rule 10 (1) (b) is in *pari materia* with the old order XXXIX rule 7 (1) (b) and allows the court on an application by any party to a suit and on such terms as it thinks fit to authorize any person to enter into any land or building in the possession of any other party.

7. Now, the representative of the plaintiff in this suit, Satish Chandra Shah, has admitted at paragraph 30 of his affidavit in reply that the property has changed hands. In any event, the initial challenge by the original plaintiff to the exercise of the statutory power of sale in favour of the 2nd defendant failed and was the subject of the finding of Hon Justice Okwengu in her ruling of 21st October 2008. In light of that ruling and the fact of the transfer, I see no plausible basis for the successor of the plaintiff to continue in possession of the suit premises. I have stated earlier that one of the prayers in the suit and the chamber summons dated 17th December 2007 was to restrain the 2nd defendant from evicting the plaintiff or taking possession of the suit premises. That application was dismissed in the above ruling. I am then clear in my mind that the relief sought by the 2nd defendant in the chamber summons is well founded. The dictates of justice enjoin me to also focus on the rights and interests of the 2nd defendant as a purchaser for value but who has been shut out of the property by the representative of the estate of the plaintiff. True, the issues raised in the suit on the sale by the bank or transfer to the 2nd defendant or the validity of the charge will be finally determined by the trial court. But the Honourable Justice Okwengu in her considered ruling of 21st October 2008 dismissed those grounds as the basis for the injunction sought by the original plaintiff. That and the other deliberations and reasons outlined above persuade me to allow the chamber summons dated 3rd May 2011. I grant orders in the following terms;

- a) The 2nd defendant is granted leave and is so authorized to forthwith enter upon and possess the suit premises being LR No 209/64/31 Nairobi.
- b) The costs and expenses incidental to the 2nd defendant's entry and possession of the suit premises being LR No 209/64/31 shall be costs in the cause.
- c) The court bailiff of this Honourable court shall effect and supervise the execution of these orders.
- d) The costs of the application are awarded to the 2nd defendant.

It is so ordered.

DATED and DELIVERED at NAIROBI this 20th day of December 2011.

G.K. KIMONDO
JUDGE

Ruling read in open court in the presence of

Mr. Obel for Gitau for the Plaintiff/Respondent.

Mr. Kandere for the 2nd Defendant/Applicant.

Mr. Ogando for the 3rd Defendant.

No appearance for the 4th Defendant